

DEVELOPMENT AGREEMENT
City of Burlington - Burlington Harbor Marina, LLC

This Development Agreement is dated this ____ day of May, 2016, by and between the City of Burlington, a Vermont municipal corporation (the "City"), and Burlington Harbor Marina, LLC, a limited liability company organized under the laws of the State of Vermont ("BHM").

WITNESSETH:

WHEREAS, the City owns certain lands on the Burlington waterfront identified as 234 Penny Lane, in Burlington, Vermont as is more fully described on Exhibit __ attached hereto (the "Marina Lot"); and

WHEREAS, the parties hereto entered into a Memorandum of Understanding dated May 28, 2015 ("MOU") whereby the parties entered into a due diligence period in order to assess the feasibility of the construction, management and operation of a Marina by BHM ("Marina"), to be located on the Marina Lot, with structures and docks extending into Lake Champlain, as shown on the Site Plan attached hereto as Exhibit __; and

WHEREAS, the Director of the City Department of Public Works commissioned a study of the impact of the Marina on the City water treatment facilities located adjacent to the Marina completed by the Dufresne Group and dated July 23, 2015 (the "WTP Report"); and

WHEREAS, the WTP Report calls for the displacement of the Marina parking area originally contemplated in the MOU; and

WHEREAS, BHM has agreed to construct a new parking lot identified below as the "East Parking Lot" to be shared by BHM and the City; and

WHEREAS, BHM shall remove the existing picnic pavilion adjacent to the fishing pier; and

WHEREAS, BHM shall construct a new Public Park adjacent to the Marina; and

WHEREAS, BHM shall provide and maintain public restrooms in its floating Marina facility; and

WHEREAS, the City may construct the replacement pavilion at a time and in a location to be determined; and

WHEREAS, the parties have decided to proceed with the "Project" (as defined below), subject to the terms and conditions of this Agreement; and

WHEREAS, the City shall Lease the "Marina Lot", as defined below, to BHM in accordance with the terms of the Term Sheet attached hereto as Exhibit __ (the "Ground Lease");

WHEREAS, BHM shall construct the Project, , in accordance with the terms hereof; and

WHEREAS, the name of the Marina shall be Burlington Harbor Marina.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises set forth herein, the parties agree as follows:

Section 1. **Marina Lot.**

Subject to the terms of this Agreement the City shall lease the Marina Lot, along with the easements and rights of way necessary to access the Marina Lot, as shown on the Site Plan , to BHM, in accordance with the terms of the Ground Lease, and the Term Sheet attached hereto as Exhibit ____.

Section 2. **Project.**

The “Project” shall include the construction of the Marina, the East Parking Lot, the Public Park, the Plaza and all related soil remediation, as is more particularly set forth herein.

(a) **Marina.**

Subject to the terms of this Agreement, and the Ground Lease, BHM shall construct and operate the Marina , which shall include the following amenities and improvements:

- Newly Constructed Wave Attenuation System
- 160 Boat Slips – a minimum of 40% of which shall be offered to transient boaters on a daily weekly, or monthly basis;
- Pump out Facilities
- Fuel Dock
- Provision for Water Taxi Stand;
- A Floating Marina Facility to include:
 - Management and staff offices;
 - Public Restrooms;
 - Guest Bathing and Laundry facilities;
 - Store & Chandlery;
- Dockmaster Facility
- Marina access, support infrastructure, staging, storage, and facilities area (New Marina Lot on the attached Site Plan) which will also provide for boat launching and hauling facilities and will be used as event space.

(b) **East Parking Lot.**

Subject to the terms of this Agreement and the Parking Agreement, BHM shall construct a new parking lot located easterly of the Burlington Electric facility and the north of Penny Lane as shown on the Site Plan and identified as the “East Parking Lot”.

The Parking Agreement shall include provisions related to:

- i. Design review and approval by the City;
- ii. Design and construction specifications;
- iii. Construction schedule;
- iv. Operation and maintenance of the East Parking Lot.

(c) **Public Park.**

Subject to the terms of this Agreement and the Ground Lease, BHM shall construct a new public park in the area northerly of the Marina Lot and westerly of the City Water Department Building, as shown on the Site Plan attached as Exhibit ____, including the following elements (“Public Park”):

- Public Park adjacent to existing Fishing Pier to include landscape, hardscape and accessory treatments (such as benches) of equivalent quality to the existing Burlington Waterfront Park.
 - Development of hardscape in the area west of the Water Department (old sailing center space), with a design to be agreed upon by the parties.
- (d) Subject to the terms of this Agreement and the Ground Lease, BHM shall construct a plaza to include short-term, ADA and drop off parking spaces, as shown on the Site Plan (the “Plaza”).

Section 3. **Parking Agreement.**

Subject to the terms of this Agreement, and the Parking Agreement, the Project shall include the following:

- A) BHM shall construct, to City parking lot design and construction standards:
- (i) the Plaza located within the boundaries of the Marina Lot containing 10 parking spaces, 4 of which are handicapped restricted; and
 - (ii) the East Parking Lot, which shall consist of 68 parking spaces;
 - (iii) the 4 Marina employee parking spaces, located on the Marina Lot, and shown on the Site Plan attached hereto as Exhibit ____.
- B) As proposed, the 160 slip Marina would require 80 spaces under current City zoning regulations (.5 per slip). The parties agree the Marina zoning permit application will include a request for a waiver of the parking requirement to an allocation of 48 parking spaces. The request will be based on the following assumptions: (i) the maximum number of seasonal slips requested will be 96 (60% of 160), reducing the requirement for parking spaces to 48 (.5 per slip); and (ii) the users of the 64 transient boat slips are less likely to need parking, as they arrive at the Marina by boat. The distribution of parking spaces allocated to the Marina, to satisfy minimum parking requirements, will be proposed to the DRB as follows:
- i) 42 of the 68 parking spaces in the East Parking Lot; and
 - ii) 4 employee parking spaces on the Marina Lot as shown on the Site Plan attached hereto as Exhibit __; and
 - iii) 2 handicapped parking spaces on the Marina Lot as shown on the Site Plan attached as Exhibit __.

In the event the number of boat slips permitted to be constructed by the Marina is less than 160, the seasonal component of which being less than 96, the number of parking spaces allocated to the Marina shall be reduced in proportion to the reduction in the number of slips. In the event the DRB does not grant the waiver referred to herein, the City will make best efforts to work with BHM to facilitate an acceptable parking agreement necessary to satisfy City zoning requirements.

- C) The parking lots shall be used as follows:
- (i) The Plaza shall provide 2 of the 4 handicapped parking spaces required to satisfy ADA parking requirements for the Marina. The other 2 handicapped parking spaces in the Plaza

shall satisfy the existing fishing pier handicapped parking requirements. The Plaza shall be restricted to short term use for drop-offs only.

- (ii) The East Parking Lot shall be used as follows: the 23 parking spaces located in the western section of the East Parking Lot shall be restricted to exclusive use by the Marina during the period from May 15 through October 15 of each year. During the off-season period of October 16 to May 14 each year, these 23 spaces shall be made available to the public on a first-come first-serve basis. 19 of the remaining 45 spaces in the East Parking Lot shall be restricted to exclusive use by the Marina on weekends and City Holidays during the period from May 15 through October 15 of each year. A weekend period shall be deemed to commence at 6:00 pm on each Friday and terminate at 8:00 am on each following Monday morning. A holiday shall be deemed to commence at 6:00 pm the day before the holiday, and terminate at 8:00 am on the day following the Holiday. In the event a Holiday falls adjacent to a weekend the periods shall run sequentially as one period. BHM will pay the City for the use of the 19 additional weekend/holiday parking spaces. The rate for these parking spaces shall be established by calculation of the number of weekend days and holidays applicable annually multiplied by the Burlington Parks & Recreation Department's Daily Parking rate as established for the applicable year multiplied by nineteen (19). BHM can elect to reduce its number of weekend/holiday spaces with thirty (30) days' notice. BHM agrees that it will implement a policy of prioritized use of the 23 (plus the additional 19 spaces on weekends and holidays) exclusive use spaces in the East Parking Lot. The remaining 45 (26 on weekends and holidays) will be managed by the City for short-term parking and made available to the public on a first-come first-serve basis and in a manner designed to maximize parking efficiencies and working with other Waterfront stakeholders.
 - (iii) The 4 parking spaces behind the Water Treatment Facility (on the Marina Lot) shall be used for Marina employees only.
- D) Notwithstanding the City's obligations under (C) (ii) above, the City may, in its discretion, allocate up to 10 parking spaces in the East Parking Lot to another project for its exclusive use but with the same shared usage goals and objectives described herein for the East Lot to maximize parking efficiencies for other Waterfront stakeholders.
- E) The parties shall enter into a Parking Agreement (the "Parking Agreement") in the form of the agreement to be included as an attached to the Ground Lease which will govern:
- 1. The construction, use and maintenance of the Plaza located on the Marina lot; and
 - 2. The construction, use and maintenance of the East Parking Lot located on City land; and
 - 3. The terms of use of the Marina Employee spaces which are located on the Marina Lot.

Section 4. **Permitting Contingency**

BHM shall bear all of the costs and expenses of obtaining the final and unappealable permits and approvals from all governmental authorities with jurisdiction over the Project including, but not limited to: subdivision approval for the Marina Lot, local COA Level I approval, State of Vermont Water and Wastewater Permit, State Stormwater Permit or Amendment (if required), State Lake Encroachment Permit, US Army Corps of Engineers General Permit; for the construction and use of the Marina ("Permits and Approvals"). BHM shall compensate the City for any reasonable design, permit and construction costs incurred by the City relative to improvements to the Project (including any necessary off-site improvements) provided that the costs are

approved by BHM in advance, which approval shall not be unreasonably withheld. Subject to Marina compliance with the terms of this Development Agreement and being consistent with the terms and conditions thereof, the City shall cooperate with of BHM's efforts in obtaining the Permits and Approvals. The Parties' obligations under this Agreement shall be subject to BHM obtaining the Permits and Approvals consistent with this agreement or on terms otherwise satisfactory to the Parties by December 31, 2017, subject to extension by mutual agreement (the "Permit Contingency Period"). The Permitting Contingency shall be deemed satisfied upon submission by BHM of a stamped engineers affidavit evidencing all permits necessary to commence construction of the Project have been obtained.

The City shall allow any previously permitted parking spaces for fishing pier and Water Department lost as a result of the Project to be relocated.

The City shall assist BHM in showing the State of Vermont permitting authorities that there is no space on land to provide the Marina facilities that are to be located in the floating Marina facility. The City shall support the application by BHM for Permits and Approvals and shall cooperate with BHM in accordance with Section 17, below. In the event BHM is unable to obtain the Permits and Approvals, with satisfactory terms, during the Permit Contingency Period including all extensions, this Development Agreement and the Ground Lease shall terminate.

Section 5. Ground Lease.

The Mayor and the City Administration are hereby authorized to execute and deliver a Ground Lease for the Marina Lot, which shall contain the provisions set forth on the Ground Lease Term Sheet attached hereto as Exhibit __, along with customary ground lease provisions. The Ground Lease shall be held in escrow pending completion of the Ground Lease Pre-Conditions set forth below. The Ground Lease and the Parking Agreement shall be completed, executed and delivered into escrow, upon terms acceptable to the parties, no later than June 30, 2016. The Completion Guarantee in a form acceptable to the parties shall be attached to the Lease prior to placing in escrow lacking signatures and final Project cost amount.

Section 6. Ground Lease Pre-Conditions.

The Ground Lease and Parking Agreement shall be released from escrow by the City upon receipt of the following from BHM:

- a. A legal opinion, delivered in reliance upon an engineer's opinion confirming that BHM has all Permits and Approvals necessary for the commencement of construction of the Project within the Permit Contingency Period; and
- b. Written financing commitments on terms satisfactory to BHM, along with the Project budget, and sources and uses sufficient to develop the Project, within 90 days of the end of the Permit Contingency Period, but in no event later than April 1, 2018; and
- c. Project schedule; and
- d. A Guaranteed Maximum Price provided by BHM for construction of the East Parking Lot and the "Additional Public Improvements" referenced in Section 12 herein; and
- e. Completion Guarantee to the benefit of the City for the total cost of the Project as described in Section 2 (a), (b) and (c).

(the "Ground Lease Pre-conditions")

The Ground Lease Pre-conditions shall be to the City's satisfaction, which shall not be unreasonably withheld.. The Ground Lease Pre-conditions shall be deemed acceptable to the City if the City fails to communicate a reasonable objection within 10 days of receipt thereof. In the event of a reasonable objection by the City,

BHM shall have 30 days to re-submit the applicable Ground Lease Pre-Condition, In the event the Ground Lease Pre-conditions have not been met by April 1, 2018, this Agreement, and Ground Lease and the Parking Agreement shall terminate.

Section 7. Real Estate Taxes.

It is the intention of the parties that BHM shall pay all property taxes on the real and associated improvements levied on the Marina by the City of Burlington commencing with the release of the Ground Lease from escrow pursuant to the provision of this Development Agreement and the attached Ground Lease. In addition, BHM shall pay all Business and Equipment Taxes levied by the City of Burlington on the personal property of the Marina. BHM hereby waives any right to appeal real estate taxes imposed by the City on the basis of a legal argument that the City cannot include floating or fixed waterside improvements in its assessment of the Property. BHM shall also pay its annual pro rata share of PILOT payments on the Marina Lot which is paid by the City of Burlington Water Department for its property located at 234 Penny Lane and

Section 8. Operations of the Marina.

Upon completion, the Marina shall be open and accessible to the public and to clients, in accordance with the terms of the Ground Lease.

Section 9. Pavilion Relocation.

The parties acknowledge that BHM's current plan incorporates land owned by the City (and managed by Burlington Parks & Recreation) that is currently utilized for a lakefront picnic pavilion. The pavilion was built with U.S. Department of the Interior – Land and Water Conservation Fund grant money, and the parties understand and acknowledge that the pavilion cannot be moved without applicable Federal and/or State authorization. The City shall be responsible for getting all necessary authorizations for removal of the pavilion no later than sixty (60) days following the execution of this Agreement. Thereafter, and provided the necessary authorizations have been obtained, as part of the development plans for the Marina, BHM shall remove this structure. In the event the City fails to obtain said authorizations within sixty (60) days of the date of this Agreement, the Permit Contingency Deadline and the Ground Lease Preconditions shall be extended *by the number of additional days required to obtain necessary approvals* BHM acknowledges and agrees that the City may, at some time in the future, at its sole discretion, relocate the pavilion to any portion of the northern waterfront except the Marina Lot. BHM shall provide public restroom facilities in the Marina facility. Daily access to public restrooms shall be provided from May 15 through October 15 from ____ a.m. to ____ p.m.

Section 10. Compatibility with Water Department Operations

BHM acknowledges that the Project is located directly adjacent to the City of Burlington Water Department and will work in good faith with the City to assure on-going and future operations of its Water Department. To determine, feasibility, compatibility and potential constraints between the Water Department and BHM, a report was commissioned by the Water Department and prepared by The Dufresne Group, dated July 7, 2015 (Exhibit____).

Consistent with the findings of the Dufresne group report, BHM agrees to the following:

To assure adequate access for tractor-trailer deliveries to the Water Plant, BHM agrees to restrict parking during scheduled delivery dates or move vehicles in a timely fashion to allow for unimpeded truck access and deliveries.

BHM shall provide adequate protection if necessary based on the proposed uses of the area above the utilities as determined by the City, with concrete encasement (or other City approved approach which adequately addresses Dufresne report concerns) for existing underground infrastructure (e.g. pipes / water lines) under the area west of the WTP.

The Marina Lot shall not include the berm on the southern side of Water Plant Building.

The Ground Lease shall provide the Water Department with rights of access to the Water Department building for purposes of its maintenance, repair and operations at all points where the Marina Lot abuts the Water Department building.

Marina will grant access across the Marina Lot and upon or under the Marina waterside improvements to the City for Water Department repair, maintenance or operational needs. Where feasible, City shall make all reasonable efforts to coordinate such maintenance, operations and repairs with Marina; shall include consideration being given to off-season scheduling. City shall return the Marina Lot to its pre-existing condition upon completion of such work. City shall not be liable for claims for lost business during such maintenance, operations or repairs. The City reserves the right to maintain, repair, replace, expand or otherwise address its operational needs relating to underground/underwater piping serving the City's Water Department. Marina construction and operations shall not create impacts to the flow vault outside of the southwest corner of Water Department Building such that removal of the flow vault or any other costs for mitigation of said impacts is required unless approved by the City and funded by BHM.

The Marina's dock layout shall be designed to ensure the protection of the Water Department's 30" water intake pipe. Prior to commencing the permitting process for the floating dock system and anchoring, BHM shall submit its dock layout to DPW for review and approval, which shall not be unreasonable withheld or delayed.

The parties each covenant and agree for themselves and their successors and assigns that any construction, maintenance, repairs or replacements performed pursuant to an access right granted or reserved hereunder or under the Ground Lease shall be coordinated with the owner of the affected property, and that any disturbed property shall be promptly restored to its prior condition in a good and workmanlike manner.

Section 11. Tax Increment Financing (TIF) Funding Considerations.

Subject to the contingencies and provisions set forth in this Agreement, and as a portion of the Project, BHM shall construct the East Parking Lot, the Park, the Plaza, and shall be responsible for related soil remediation (collectively, the "Project Public Improvements"). The parties acknowledge and agree that the construction of the Project Public Improvements must be bid and accounted for separately from BHM's private improvements. The parties further agree that all bids and contracts for the Project Public Improvements shall be made available for City review and approval, which approval shall not be unreasonably withheld and shall be delivered within ten (10) days of receipt.

The Project Public Improvements shall be paid for as follows:

A: Pursuant to voter approval of a March 4, 2014 ballot item, the City shall contribute up to \$500,000 in funds for the TIF eligible public infrastructure in support of the Project Public Improvements. The portions of the Project Public Improvements designated for the use of these specific TIF Funds (“BHM TIF Eligible Work”) are:

1. Soil remediation including testing, environmental assessment, inspections, permits and fees and expenses. And all costs related to handling, storing, placing and capping soils on site as described in the CAP amendment related to this Project;
2. 57 % of the cost of construction of East Parking Lot including design, engineering, inspections, permits and fees and expenses and all costs to construct lot and landscaping within project limits shown and as described on the attached Budget, attached hereto as Exhibit 5 (the “Budget”); and
3. 50 % of the cost of construction of the Public Park , including design, engineering, inspections, permits and fees and expenses and all costs to construct the park within project limits shown and as described in the Budget ; and
4. The Plaza, including design, engineering, inspections, permits and fees and expenses and all costs to construct the plaza within project limits shown in the Budget.

In the event the cost of the work is less than budgeted such that requests for payment total less than \$500,000, the balance of funds shall be applied towards the Additional TIF Public Improvements as described below.

B: Additionally, pursuant to the voter approval of the ballot item referenced above, which allowed for advancement of several additional projects on the City’s northern waterfront, the City has determined that it makes economic sense to complete the above-referenced Public Park and the East Parking Lot within the scope of work for the Project. Therefore, the City will utilize up to \$298,646.00 of additional voter approved TIF funds to pay for the actual cost to construct the remainder of the Project Public Improvements, as follows: (“Additional TIF Eligible Work”)

1. 43 % of the cost of construction of the East Parking Lot , including design, engineering, inspections, permits and fees and expenses and all costs to construct lot and landscaping within project limits shown and as described on the attached Budget(to be funded by utilizing voter approved Waterfront Access North (WAN) project TIF funds; and
2. 50 % of the cost of construction of the Public Park , including design, engineering, inspections, permits and fees and expenses and all costs to construct park and landscaping within project limits shown and as shown in the Budget.(to be funded by utilizing voter approved New Moran project TIF funds).
- 3.

Payment to BHM of the TIF Funds shall be made upon completion the Project Public Improvements listed above. Payments shall be in the form of reimbursement for documented expenses related to each of the East Parking Lot, the Plaza, the Park and soil remediation. BHM shall provide copies of original invoices and lien waivers as proof of payment for eligible expenses.

Payment by the City shall be made within 60 days of submission of a completed request for payment by BHM. The City shall notify BHM with 10 days of receipt of a request for payment if it deems the request to be incomplete.

Under the terms of this Agreement the City will make best efforts to not make, request or cause changes to the Project Public Improvements. In the event a change to the Project Public Improvements is deemed necessary by the City, such that without such change the Project Public Improvements may not proceed to the satisfaction of the City and that such change causes an increase to the cost of the Project Public Improvements, the parties agree to work in good faith to amend this Agreement to allow the Project to proceed, including increasing or decreasing the scope of work or changing specification or schedule of work prior to the Lease

preconditions being met. This includes changes necessitated in order to obtain permits for the Project Public Improvements. Provided however, if the cost of construction of the East Parking Lot, as shown on the Site Plan attached as Exhibit 2, exceeds the amount shown in the Budget, BHM shall be responsible for payment of the excess cost.

The term “completion” as used in this Section shall mean, for each item of TIF Eligible Work listed above, construction is complete in conformance with the Lease, or the Parking Agreement, and the improvements have obtained all governmental approvals required in order to use such improvements including Certificate of Occupancy from the City, if applicable. In addition, BHM shall have delivered all documentation required by the City and the Vermont Economic Progress Council for the use of TIF Funds with its request for payment, and BHM has provided documentation of payment for the work in the form of lien waivers.

Section 12. Public Trust Doctrine.

The parties agree and acknowledge that the City has certain responsibilities with respect to lands that have been dedicated to the public trust. BHM agrees to work in good faith with the City and to take such reasonable actions as may be necessary or appropriate to enable the City to carry out its responsibilities under the public trust doctrine, and agrees that the Project is intended promote the public’s access to, and use and enjoyment of, the Burlington Waterfront and to further the purposes of the public trust doctrine.

Section 13. Public Access Agreement.

The parties acknowledge that the Marina shall be accessible to the public.

BHM hereby agrees that the following areas of the Marina that will be open in season, during business hours, to pedestrians and the general public (not solely Marina clientele): the public restroom facilities; store and chandlery; and the water taxi stand. It is also agreed that the Marina’s entire perimeter dock (i.e. the wave attenuation system) shall be open to the general public daily from 7am to 10pm. This area is depicted on the Site Plan.

The City acknowledges and agrees that BHM will be installing security measures typically found within public marinas (which may include the limited use of card entry systems in agreed upon locations and security cameras). These installations will limit public access to areas not listed above as generally accessible to the public, for the benefit of boat owners using the Marina.

Section 14. Stakeholder Cooperation.

To successfully execute and operate the Marina, the City and BHM recognize the need to coordinate with other Waterfront property owners and stakeholders, including, but not limited to the Lake Champlain Transportation Company, The United States Coast Guard, Lake Champlain Community Sailing Center, Burlington Water Department, Burlington Electric Department and Burlington Parks & Recreation Department.

Section 15. Wind & Wave Engineering Study.

BHM shall use the design outlined in the Wind & Wave Study commissioned by BHM in order to design the floating break water system that is to be built as part of the Marina.

Section 16. South Harbor Marina.

The parties hereby acknowledge that the US Army Corps of Engineers (“ACOE”) shall require a master plan application in order to approve any new expansion of marine facilities in the Burlington Harbor (“Harbor Master Plan Application”). The City has proposed development of a marina located in the City’s southern harbor, adjacent to Perkins Pier, which will need to be incorporated into the Harbor Master Plan Application. The City shall work cooperatively and expeditiously with BHM to draft the Harbor Master Plan Application. The City acknowledges that ACOE may limit the number of slips that may be added in the Burlington Harbor. The City shall give preference to Permits and Approvals for 160 boat slips by BHM, and shall phase any future south harbor expansion if required for ACOE approval of the Marina. In addition, the City agrees to make best efforts to provide, under the timeframes outlined in this Agreement any necessary documentation, studies, engineering, required for the south harbor expansion, at the City’s sole cost and expense. BHM shall be responsible for such documentation, studies, engineering, required for the Marina, at BHM’s sole cost and expense. In the event that permitting requirements for the South Harbor are not provided or met within the timeframes outlined in this Agreement then the Permit Contingency Period shall be extended accordingly.

Section 17. Stormwater Management Fees and Costs.

BHM shall be responsible for the costs of its prorata share of the necessary stormwater system operation and maintenance costs; stormwater system inspection costs; state stormwater operational permit fees; as well as the city’s stormwater fees relating to impervious area of the Marina Lot as well as its prorata share of the East Parking Lot costs and fees attributable to its May 15 to October 15 exclusive use of 23 spaces in said lot.

Section 18. Site of East Parking Lot.

The City shall ensure that the site of the East Parking Lot, to be constructed by BHM, is left in the condition anticipated in the City’s WAN Plan upon the commencement of the Ground Lease.

Section 19. Right to Modify Property Description.

The parties hereto reserve the right to modify the description of the Marina Lot, as shown on the Site Plan, to conform to the requirements of the Permits and Approvals, as the same may be amended, changed or modified from time to time.

Section 20. Authority.

Each of the parties hereto represents and warrants that it has the power and authority to enter into and perform the terms of this Restated Agreement in accordance with its terms.

Section 21. Force Majeure.

Neither the City nor BHM shall be deemed in violation of this Agreement if they are prevented from performing any obligations hereunder by reason of strikes, boycotts, labor disputes, acts of God, acts of the public enemy, acts of superior governmental authority, severe weather conditions, riots, rebellion, sabotage, or any other circumstances for which they are not responsible or which is not under their control, and the party experiencing force majeure gives written notice to the other party identifying the nature of such force majeure, and when it began. The party experiencing force majeure shall take immediate action to attempt to remove such causes of force majeure as may occur from time to time and its operations under this Agreement shall

be resumed immediately after such cause has been removed, provided that neither party shall be required to settle any labor dispute except upon terms that party deems acceptable. The suspension of any obligations under this section shall not cause the term of this Agreement to be extended and shall not affect any rights accrued under this Agreement prior to the occurrence of the force majeure. The party giving notice of the force majeure shall also give notice of its cessation.

Section 22. Dispute Resolution.

A. Should a dispute arise between the parties as to the meaning or intent of any provision of this Agreement, or as to an obligation of a party hereunder, the parties will first attempt to resolve such dispute by mutual negotiations and, if the dispute persists, the utilization of any experienced independent mediator. Should the dispute continue notwithstanding the efforts of the mediation process, the parties shall submit the dispute to final binding arbitration.

B. In the event of a material breach of this Agreement, which is discovered by the non-breaching party during the period in which this Agreement is being actively performed, the non-breaching party shall notify the alleged breaching party of the alleged material breach. The non-breaching party may first endeavor to remedy the breach by direct discussions with the alleged breaching party. If such discussions fail to cure the breach within a reasonable period of time, not to exceed thirty (30) days, or if the circumstances require immediate action, the non-breaching party and the alleged breaching party will submit the matter to an experienced independent mediator for resolution of the matter. Should the parties fail to reach an agreement as a result of mediation, the matter shall be submitted to final binding arbitration. Claims for damages or other remedy for any breach of this Agreement that are discovered subsequent to the completion of this Agreement may be pursued directly through arbitration. Claims which do not involve breach of this Agreement shall be subject to arbitration and a party may pursue its judicial remedies for such claims.

C. Arbitration shall be initiated by written notice to the other side or sides involved in the dispute of intent to seek arbitration. Arbitration under this Agreement shall be governed by the Vermont Arbitration Act, except that the parties shall make good faith efforts to complete and have a decision rendered within forty-five (45) days of notice invoking arbitration. The parties shall try to agree upon an arbitrator within five (5) business days of the notice invoking arbitration. If the parties cannot agree upon an arbitration, then, within three (3) additional business days, each party shall select an arbitrator and the selected arbitrator shall select a third arbitrator. The parties shall equally share the cost of arbitration.

Section 23. Assignment.

This Agreement shall not be assigned by any party without the advance written approval of the other, which shall not be unreasonably withheld, except that BHM may assign its interest in this Agreement, the Ground Lease and the Parking Agreement, to any bank or financing entity (ies) from which it acquired Project Financing and/or to any entity owned, controlled, managed or merged with BHM or any of its principals.

Section 24. Indemnification.

Each party shall, from and after the date of execution of this Agreement, defend, indemnify and hold harmless the other party (together with its representatives, officers, employees and agents) from and against all loss, liability, damages, claims, proceedings, costs (including costs of defense and attorneys' and professionals' fees incurred in defense or incurred in enforcement of this indemnity), expenses, demands, suits and causes of action (all of the foregoing collectively referred to as "Liabilities") arising out of damage to any property or death or injury to any person sustained on the Marina, or arising (directly or indirectly) out of or in connection with the possession, use, occupation or control of the Marina or the development of or the

construction of improvements on the Project, by the indemnifying party and from and against all Liabilities arising out of damage to any property or death or injury to any person anywhere occasioned, or claimed to have been occasioned, by any act, neglect or default of, or work performed by, the other indemnifying party, its agents, employees, licensees or contractors (except to the extent such damage, death or injury shall be caused by the affirmative act or negligence of the claiming party or its employees or agents). Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist for the benefit of a party or person to be indemnified under this Section.

Section 25. **Amendment.**

This Agreement shall not be varied in its terms by any oral agreement or representation, or otherwise than by an instrument in writing of subsequent date hereto executed by the party to be bound thereby.

Section 26. **Invalid Provisions.**

In the event any term, covenant or condition herein contained is held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, covenant or condition herein contained, provided that such invalidity does not materially prejudice either party in their respective rights and obligations contained in the valid terms, covenants or conditions hereof.

Section 27. **Construction.**

The language in all parts of this Agreement shall in all cases be construed simply according to its fair meaning and not strictly construed against either party, as it is agreed that both parties participated in the drafting hereof.

Section 28. **Miscellaneous Provisions.**

- a) The rights granted to BHM under the Development Agreement shall be limited to the Marina and the East Parking Lot and the Development Agreement shall not grant BHM rights to other properties owned by the City,
- b) The parties shall work cooperatively to meet the following reporting requirements necessary to meet the annual HUD / BEDI and 108 loan benchmarks:
 - Report of all green development standards and energy start standards utilized in construction (upon completion of construction)
 - Report of the number of construction jobs created (upon completion of construction)
 - Report of Business sales volumes (annually)
 - Report on jobs created (annually)
- c) All notices required to be delivered under the terms of this Agreement shall be given in writing and delivered by hand or by email with proof of delivery to the following addresses:

For City:

Miro Weinberger, Mayor
City of Burlington
City Hall
149 Church Street,
Burlington, VT 05401

With a copy to:

For BHM:

Jack Wallace
Charles DesLauriers
Managing Members
25 Cherry St
Burlington, VT 05401
jwallace@gmavt.com

With a copy to:

Catherine Dingle
Murphy Sullivan Kronk
275 College Street
Burlington, VT 05401
cdingle@mskvt.com

- **Signature Page Follows** -

IN WITNESS WHEREOF, this Development Agreement executed by the duly authorized officers or representatives of the City of Burlington and Burlington Harbor Marina, LLC as of the day and date first above written.

THE CITY OF BURLINGTON

By: _____
Miro Weinberger, Mayor
Duly Authorized Agent

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

At Burlington, in said County, on the ____ day of _____, 2016, personally appeared, Miro Weinberger, Mayor of the City of Burlington and acknowledged this instrument by him, sealed and subscribed to be his free act and deed, and the free act deed of the City of Burlington.

Before me,

Notary Public

Commission Expires 2/10/2019

BURLINGTON HARBOR MARINA, LLC

By: _____
Jack Wallace, Managing Member
Duly Authorized Agent

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

At Burlington, in said County, on the ____ day of _____, 2016, personally appeared, Jack Wallace, Duly Authorized Agent of the Burlington Harbor Marina, LLC, and acknowledged this instrument by him, sealed and subscribed to be his free act and deed, and the free act and deed of the Burlington Harbor Marina, LLC

Before me,

Notary Public

Commission Expires 2/10/2019